

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

----- X
In the Matter of the Proceeding Pursuant to
Section 44, subdivision 4, of the Judiciary Law
In Relation to

FRANK M. MORA,

a Judge of the Poughkeepsie City Court,
Dutchess County

----- X

RESPONDENT'S REPLY BRIEF TO COMMISSION
TO CONFIRM IN PART AND DISAFFIRM IN PART
REFEREE'S FINDINGS AND CONCLUSIONS

DATED: June 2, 2026

Stephen R. Coffey, Esq.
O'Connell & Aronowitz
6 Airport Park Blvd.
Latham, New Yor 12110
[REDACTED]

Attorneys for Hon. Frank M. Mora

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PRELIMINARY STATEMENT

Respondent, Frank M. Mora, ("Respondent"), by and through his counsel, O'Connell & Aronowitz P.C., submits this Reply Brief to the Commission on Judicial Conduct ("Commission") to confirm in part and disaffirm in part the findings and conclusions in the report of the referee dated April 9, 2026 (the "Report").

Daniel Patrick Moynihan once aptly stated, "Every man is entitled to his own opinion. No man is entitled to his own facts." Commission Counsel consistently and blatantly misstates the record in this case. Commission Counsel has previously argued, and does so up to the present time, that Michael Sussman, counsel for Respondent, advised him not to bring a defamation case against Ms. Koch. However, the statement made by Commission Counsel that Attorney Sussman advised Respondent not to bring the defamation case, and that Respondent had no basis to do so, is not simply a difference of opinion, it is blatantly untrue. There is not a scintilla of credible evidence in this case refuting the fact (despite the Referee's strange observation unsupported by any evidence) that Respondent brought the lawsuit based upon the convincing and unequivocal advice of Attorney Sussman.

Was Respondent angry when he was testifying, as pointed out by the Referee? Of course he was. He had been libeled. His anger, however, is not the issue. The issue is whether he brought the defamation case as retaliation against Ms. Koch with no basis whatsoever. Ms. Koch threatened to destroy him, and as it turns out, she has been prescient. Further, she unlawfully publicized her false statements the very day after she filed her complaint with this Commission by sending the complaint to the Mayor of the City of Poughkeepsie, and then she systematically defamed him to person after person. She was extremely proud about that, even to the point of exclaiming that she would tell anyone who would listen.

Respondent was angered even more when, in her opening statement at the hearing, Commission Counsel outright misstated that it was Respondent who made the complaint to the Commission public when he filed the defamation lawsuit when she knew for a fact that Ms. Koch had unlawfully made the complaint public long before the defamation action was commenced.

Respondent did not choose to go quietly into the night, and, despite Ms. Koch's false testimony and her unlawful publication of her false facts, which was ignored if not supported by Commission Counsel, Respondent in no way violated his oath of office.

INTRODUCTION

The Referee made findings of fact and conclusions of law with respect to the three charges made against Respondent. He recommended that there was no basis for Charges I and III. He recommended that Charge II was sustained.

On May 19, 2026, Respondent filed his brief with the Commission that agreed with the Referee's conclusions that there is no basis for Charges I and III and contended that such conclusions should be confirmed. Respondent's brief disagreed with the Referee's findings and conclusions that Charge II was sustained and contended they should be disaffirmed.

On May 19, 2026, the Commission Counsel filed its brief with the Commission that disagreed with the Referee's conclusion that there is no basis for Charge I and agrees with the Referee's conclusion that Charge II was sustained. The brief of Commission Counsel does not address the Referee's conclusion that there is no basis for Charge III.

Respondent files this brief in reply to the brief of Commission Counsel and will explain that the Referee correctly concluded that there was no basis for Charge I and that the Referee was incorrect in concluding that Charge II was sustained.

**I. THE REFEREE CORRECTLY CONCLUDED
THAT CHARGE I WAS NOT SUSTAINED.**

Charge I alleged that, on or about December 28, 2021, while at Seeta Eye Center (“Seeta”), an ophthalmology practice in Poughkeepsie, Respondent engaged in a discourteous verbal confrontation with Stacey Koch, an office manager at Seeta, over Respondent’s failure to wear a mask in the office, refused to comply with Ms. Koch’s repeated directives to leave the premises if he would not wear a mask as required by Seeta’s office policy and left only after a police official said he would send an officer to Seeta.

As noted by the Referee in his report, the facts concerning this charge were vigorously disputed by Ms. Koch and Respondent. Moreover, Ms. Koch’s version of the events is also contradicted by the testimony of Michael Brown, a coworker of Ms. Koch, who witnessed the incident. Cythia Feather and Karen Monteverdi, also co-workers of Ms. Koch, corroborated some of Ms. Koch’s story, but disagreed with Ms. Koch’s testimony that Respondent was yelling. The Referee expressly found that Mr. Brown was a disinterested observer and was credible and that Mr. Brown testified credibly that it was Ms. Koch and not Respondent who acted unprofessionally (Report at p. 21). The Referee recommended that there was no basis for Charge I.

Commission Counsel’s sole argument with respect to Charge I is that the charge should be sustained because Respondent refused to leave Seeta despite being asked to do so. Commission Counsel argues that Respondent left Seeta only after Ms. Koch called the police and that this refusal, by itself, amounts to misconduct. The Referee found, to the contrary, that “[a] preponderance of the credible evidence demonstrates that Respondent left Seeta not because he thought the police were coming, but in order to attempt to secure the documentation that Ms. Koch was requesting so that his son could be treated that day” (Report at p. 21).

Commission Counsel's version of the facts appears to be that Respondent remained at Seeta for a long period of time and refused to leave despite repeated requests by Ms. Koch and only left after she called the police, and Commission Counsel's position is based solely on Ms. Koch's version of the events. As was the case with Ms. Koch's version of the other event of that day, her version of Respondent's alleged refusal to leave Seera is inconsistent with the testimony of the other witnesses. The Referee was certainly free to credit the testimony of the other witnesses on this issue, particularly in light of the fact so much of Ms. Koch's other testimony was unbelievable.

As stated above, Mr. Brown testified that it was Ms. Koch and not Respondent who was acting unprofessionally (Report at p. 21; Tr. p. 309), and the Referee expressly found the testimony of Mr. Brown to be credible (Report at p. 21). Mr. Brown also testified that the entire interaction lasted only two to five minutes (Report at p.16; Tr. p. 309). The Referee was free to credit the testimony of Mr. Brown and find that Respondents' initial refusals to leave Seeta were minor errors of judgment (Report at p. 21).

Commission Counsel falsely states, without offering any support whatsoever that "Respondent's repeated refusal to leave was more than just 'annoying' – it provoked anxiety and fear in a public setting" (Commission Counsel brief at p. 43). On the contrary, the Referee specifically found that "[a] preponderance of the evidence, and lack of evidence demonstrates that no member of the public, particularly referring to other patients present in the Seeta waiting room that day, were disturbed by, or even heard, the incident." (Report at ¶ 8 on p. 21).

Commission Counsel seeks to claim that Respondent's failure to immediately leave Seeta was improper by analogizing to civil trespass. Commission Counsel is incorrect because Respondent had a right to be at Seeta, which was an office open to the public. Seeta is a place of Public Accommodation, as defined by 42 U.S.C. Chapter 126. Section 12181(F) lists, among

many other establishments, a professional office of a health care provider. As a result, Seeta was bound by the American with Disabilities Act (“ADA”). Commission Counsel’s continuing attempt to try an ADA case in this proceeding, and to audaciously attempt to bring a new charge of civil trespass against Respondent, and to do so for the very first time in this submission, is without any basis.

Commission Counsel’s attempt to have the Commission sit in the place of the Referee to attempt to discredit Respondent’s testimony of experiencing a panic attack fails utterly. To suggest in Footnote 9 of Page 40 of its brief that Respondent was not experiencing a panic attack because he was not being treated at the time is preposterous. Further, to say that Respondent did not present any evidence at the hearing, apart from his own testimony, to support his claims relating to anxiety and panic attacks, is false. Letters from both Dr. M [REDACTED], and Respondent’s therapist, K [REDACTED] R [REDACTED], LCSW, are in evidence. Both attest to Respondent’s anxiety, and Ms. R [REDACTED]-B [REDACTED] to acute anxiety, object phobia, elevated and erratic heart rate, shortness of breath, dizziness, and panic attacks (Comm. Ex 32, PDF pages 74, 76). Commission Counsel has had these letters since June 17, 2022.

Respondent demonstrated that wearing a mask caused headaches and neck pain that substantially limited a major life activity of performing manual tasks. He had a licensed doctor provide medical documentation that stated he could not medically tolerate wearing a mask. Respondent signed HIPAA releases for the Commission. Commission Counsel could have easily requested information from Dr. M [REDACTED] and Ms. R [REDACTED] but did not. Commission Counsel could have deposed both but did not.

Because Respondent’s minor son had an appointment for an eye exam, Respondent had a right to be at Seeta. Governor Hochul’s mask mandate was codified by the Department of Health

in 10 NYCRR 2.60, which specifically states that "...any person who is over age two and able to medically tolerate a face-covering may be required to cover their nose and mouth with a mask or face-covering..." (Exhibit A). Ms. Koch, after being advised by Respondent that he did not medically tolerate a mask, was in violation of the mask mandate by continuing to require Respondent to wear a mask or leave the premises.

The mask mandate allowed Respondent to be at Seeta without a mask, as he was not able to medically tolerate a mask. This information was relayed directly to Ms. Koch eleven months prior and at the time of the visit at issue here. As such, Ms. Koch could not lawfully order Respondent to leave the premises. Ms. Koch's attempt to withdraw the permission for Respondent to be at the premises based on his inability to wear a mask was unlawful. Contrary to Commission Counsel's argument, no person, whether a judge or a non-judge, who refused to leave the premises under these circumstances would have been escorted out by the police. On the contrary, had a Town of Poughkeepsie Police Officer come to the scene, he or she would have advised Ms. Koch that what she was attempting to do was in violation of the Mask Mandate.

II. THE REFEREE'S CONCLUSION THAT CHARGE II WAS SUSTAINED IS FACTUALLY AND LEGALLY ERRONEOUS AND SHOULD BE DISAFFIRMED.

A. The Mere Fact that Respondent Commenced the Defamation Action Does Not Mean that it was Retaliatory.

The Referee concluded, and Commission Counsel argues, that, because Respondent was angry with Ms. Koch, the commencement of the defamation action was retaliatory. In essence, Commission Counsel argues that the mere commencement of the action automatically makes it retaliatory. There is no support for this argument.

Respondent explained in his main brief, analogizing to the Human Rights Law, that the mere fact that a lawsuit is commenced against a party who engaged in protected activity by filing a complaint does not automatically mean that the lawsuit was in retaliation for the filing of the complaint. There must be a causal connection between the protected activity and the adverse action, thus showing that the adverse action was retaliatory (*see Rosen v Price Chopper*, 239 AD3d 1132, 1135 [3d Dept 2025]). It must be shown that the defendant was motivated, in whole or in part, by an impermissible motive (*see Bilitch v New York City Health & Hosps. Corp*, 194 AD3d 999, 1005 [2d Dept 2021]).

Applying these principles to the instant case, it is apparent that Respondent did not file the defamation lawsuit because Ms. Koch filed a complaint but only after he learned from Mr. Brown that Ms. Koch had (1) misstated the events in the complaint,¹ (2) told Mr. Brown that she filed the complaint to “go after Judge Mora” because of his position on vaccines (Tr. pp. 311-313) and was “trying to destroy [Respondent]” (Tr. p. 410),² and (3) published the fact that she filed the complaint and the contents thereof to numerous third parties in violation of Judiciary Law § 45(1).

The timeline of the relevant dates in question shows that the lawsuit was not brought in retaliation for Ms. Koch’s complaint filed with the Commission:

- 12/29/2021 – Ms. Koch files complaint against Respondent with Commission.
- 4/12/2022 – Respondent is made aware of complaint by email from Commission.
- 8/25/2022 – Ms. Koch testifies before Commission.

¹ Ms. Koch’s description of the incident was contrary to the testimony of both Respondent and Mr. Brown, and, importantly, the Referee found that Mr. Brown’s testimony was credible (Report at p. 21). Further, when compared to the testimony of Ms. Feather and Ms. Monteverdi, Ms. Koch’s description of the incident was, at best, a gross exaggeration.

² Ms. Koch admitted that she told Mr. Brown that she had filed the complaint and that she “probably” also told him that she hoped that Respondent would be removed (Tr. p. 285).

- Sept. 2022 – Mr. Brown tells Respondent that Ms. Koch told him about contents of her complaint and brags to him that she is going to get Respondent fired.
- Nov. 2022 – Respondent seeks counsel from Attorney Sussman regarding potential defamation claim.
- 12/29/2022 – Respondent files defamation action on the last day of the Statute of Limitations.

When asked whether he intended to bring a lawsuit against Ms. Koch prior to his conversation with Mr. Brown, Respondent testified “[t]here was no thought in my mind of bringing a lawsuit against Ms. Koch up until that call from Mr. Brown” (Tr. p. 410). Respondent’s Attorney confirmed that his consultation with Respondent regarding the possible defamation claim against Ms. Koch occurred between November 9 and 13 of 2022, which was after Respondent’s conversation with Mr. Brown (Tr. p. 240).

If Respondent’s intent had been to retaliate against Ms. Koch merely for filing the complaint, he would not have waited more than eight months after he found out about her filing the complaint before commencing the defamation lawsuit or seeking the independent advice of an attorney with respect to a defamation action.

Commission Counsel and the Referee seek to infer a retaliatory intent from the fact that Respondent was angry at Ms. Koch (Report at p. 31). As the Referee found, Ms. Koch’s allegations regarding the incident were baseless or, at best, a gross exaggeration. Respondent had no intention of commencing any action against Ms. Koch after he learned that she had filed the complaint but before he spoke to Mr. Brown (Tr. p. 410). Respondent was willing to let it go until Ms. Koch publicly announced her intention to destroy him. Respondent was understandably angry about Ms. Koch’s stated intention to destroy him, her gross misrepresentation of the facts regarding the incident and her publication of the complaint and the contents thereof to numerous third parties, which was in clear violation of the confidentiality requirements of Judiciary Law § 45(1). The fact

that Respondent may have been angry with Ms. Koch does not mean retaliation for the filing of the complaint was the reason Respondent filed the lawsuit—or even one of the reasons.

**B. Respondent Commenced the Defamation Action
In Good Faith on the Advice of Counsel.**

Respondent explained in his main brief that the good faith reliance on the advice of counsel is an absolute defense even if it turns out that the counsel's advice was incorrect.

Respondent, who was not knowledgeable regarding defamation, privilege or SLAPP lawsuits (Tr. pp. 413, 415, 417-418, 422, 502, 537, 560), retained Michael Sussman, Esq., who was very familiar with defamation law (Tr. pp. 215-216) to give him legal advice on whether he had a valid defamation claim against Ms. Koch (Tr. pp. 222-227, 250). Attorney Sussman testified that he advised Respondent that he had such a valid defamation claim (Tr. pp. 224-228). Specifically, he testified that, in his opinion, Ms. Koch did not have an absolute privilege (Tr. p. 236). Even after the defamation complaint was dismissed, Attorney Sussman was still of the firm opinion that Respondent had a viable defamation claim and that Respondent should appeal the dismissal (Tr. pp. 231-232, 419, 422-424).

In an affidavit submitted to the Commission, Attorney Sussman confirmed in writing the legal advice he gave to Respondent:

10. At no point did I advise Judge Mora that this was a SLAPP suit, or that it could be a SLAPP suit. It was my professional opinion prior to suit, and still to this day, that it was not a SLAPP suit. SLAPP was not discussed until after Ms. Koch filed her motion to dismiss. Supreme Court granted Ms. Koch's absolute immunity argument. I wished to appeal and believed then, and I still do, that Supreme Court's decision was erroneous. Judge Mora declined to appeal and wished to resolve the matter as we eventually did.
11. I never advised Judge Mora that this suit was not viable. It was my professional opinion then, and continues to be, that the suit was viable and that absolute immunity should not apply to false statements made in bad faith, as I believe were the facts here (Comm. Ex. 30 at p.4).

Respondent relied on Attorney Sussman's advice that he had a valid defamation claim against Ms. Koch (Tr. pp. 400, 417, 419-420, 504-505, 513, 551).

The Referee concluded that Respondent did not, in fact, rely on the advice of Attorney Sussman because, although Attorney Sussman advised Respondent that he had a claim for defamation, Attorney Sussman also told Respondent that he should consider that "it doesn't look good for a judge to sue the person who complained about him" (Report at ¶ 4 on p. 23). Commission Counsel makes this same argument in its brief. This position by the Referee and Commission Counsel is based on a misstatement of the hearing testimony.

First, the discussion about whether it looked good for a judge to sue a person who complained about him did not occur prior to the commencement of the lawsuit, but, rather, was in an email dated February 13, 2023, almost two months after the lawsuit was commenced, as part of a discussion whether the lawsuit should be withdrawn (Tr. pp. 255-256).

More importantly, it is clear that Attorney Sussman did not give Respondent legal advice not to commence the defamation action. It is undisputed that Attorney Sussman's legal advice to Respondent was that Ms. Koch did not have an absolute privilege and that Respondent had a legitimate defamation claim against her. The Referee agreed and found this fact as one of his findings of fact (Report at ¶ 5 on p. 23). Attorney Sussman then gave Respondent practical advice that it did not look good for a judge to sue a complainant. That practical advice did not in any way diminish Mr. Sussman's legal advice that Respondent had a legitimate defamation claim against Ms. Koch.

Attorney Sussman stressed this distinction in his testimony when discussing the February 13, 2023, email, and the Referee himself stated on the record that he understood the distinction:

A. The email you showed me and Judge Mora and the issue of my comments about withdrawing and the prudence of that. I just didn't want that to be understood as based on the nonviability of the claim. That's not what I was telling him. It was a prudential consideration that I thought I would share with him because I thought he deserved my view of that. But that wasn't the same as saying the case was frivolous or the case didn't have viability. It's a different kind of concern, and I just want to make that clear.

Q. Okay.

A. I don't want it to be construed as that was an advice saying, "You don't have a case, you better stop it." That wasn't what I was telling them. I was saying something else –

MR. BIENSTOCK: I think we understand that.

THE WITNESS: -- of a different nature.

MR. BIENSTOCK: I think we understand that.

(emphasis supplied) (Tr. p. 262).

It is apparent from this testimony that Attorney Sussman's legal advice to Respondent was that he had a viable defamation claim against Ms. Koch, and the discussion regarding optics was simply a prudential consideration. It is also apparent from the Referee's statements on the record (Tr. p. 262) that he understood that distinction.

The referee found that "when he [Attorney Sussman] learned of the Supreme Court Justice Maria G. Rosa's hostility toward the defamation case, he advised Respondent that he could still withdraw it (Tr.)" (Report at ¶ 4 on p. 23). Noticeably, the Referee left the transcript reference page blank. There is no such testimony. When Attorney Sussman was asked on cross examination about giving advice about withdrawing the defamation case, he stated,

Q. [i]t has to be more specific as to when. I mean, I don't think I gave him that advice before a decision on the motion, but I can't tell you. I don't remember when that would have occurred."

A. After --

Q. It was a moment in time when he and I discussed how to deal with the Supreme Court Judge's obvious disdain for the lawsuit (Tr. p. 253).

Attorney Sussman was referring to his advice about appealing Justice Rosa's decision. Attorney Sussman never advised Respondent to withdraw the defamation lawsuit because it was not viable, or because of Justice Rosa's hostility to the suit. On the contrary, Attorney Sussman was adamant that the suit was viable and that Respondent should appeal the decision (Tr. pp. 231-232). The only time Attorney Sussman expressed his opinion about withdrawing the lawsuit was in response to Respondent's February 13, 2023, email stating that he was contemplating withdrawing the matter because of religious reasons (Comm. Ex. 25; Tr. pp 256). It was in that email that Attorney Sussman made the observation regarding the optics of a judge suing the person who filed a complaint discussed above. At the time of that email, a motion to dismiss the defamation complaint had been filed, and Attorney Sussman was preparing opposing papers. The motion was not argued until March 27, 2023 (Comm. Ex. 14) and was not decided until April 4, 2023 (Comm. Ex. 15), so Mr. Sussman's observation could not possibly have been based on Justice Rosa's opinion of the lawsuit. There is no evidence that Justice Rosa was hostile to the lawsuit at the time of the February 13, 2023, email or at any point prior to her decision.

It is apparent that Respondent did, in fact, rely on Attorney Sussman's legal advice that he had a viable defamation claim against Ms. Koch by authorizing the filing of the defamation complaint. On the other hand, Attorney Sussman told Respondent that he did not have claims against Ms. Koch for tortious interference or HIPAA violations (Tr. pp. 224, 251, 416), and Respondent followed his advice and did not include such claims in the complaint.

Indeed, the only legal advice given by Attorney Sussman that Respondent did not follow was Attorney Sussman's advice that the order dismissing the defamation complaint was incorrect and that Respondent should take an appeal (Tr. pp. 231-232, 419). Respondent decided, instead,

to settle (Comm. Ex. 16) At the time of the settlement, Justice Rosa had dismissed the defamation complaint and what was pending was Ms. Koch's motion for attorneys' fees (the "Fee Motion"). The Settlement Agreement expressly provides that the settlement was "to resolve the Fee Motion without further litigation" (Comm. Ex. 16 at p. 2). Respondent agreed, among other things, to pay \$20,000 in attorneys' fees in full satisfaction of the Fee Motion and to waive his right to appeal from the order dismissing the complaint (Comm. Ex. at pp. 2-3). It was unquestionably the prerogative of Respondent, like that of any client, to choose to avoid the cost and uncertainty of an appeal in favor of a settlement. Attorney Sussman recognized this prerogative, "Judge Mora was the client. I was not the client. And Judge Mora indicated to me a desire to settle the matter, not appeal. And that was his decision" (Tr. p. 232). Respondent's decision to settle and not appeal can hardly be characterized as a "rejection" of Attorney Sussman's advice.

**C. The Commencement of the Defamation Action
Was Not an Attack on the Commission.**

Commission Counsel contends that Respondent's commencement of the defamation action against Ms. Koch was somehow an attack on the Commission itself. There is absolutely nothing to support this argument.

The defamation action was commenced against Ms. Koch because of her conduct and had nothing to do with anything done by the Commission. First, Ms. Koch's description of the incident in her complaint, when compared to the descriptions of all of the witnesses at the hearing, was, at best, a gross exaggeration and, at worst, an outright misstatement of the facts. Secondly, as described in detail below, Ms. Koch unlawfully disclosed to numerous third parties the fact that she had filed the complaint and the contents thereof long before the defamation action was commenced, and she admitted that she did so intentionally because, notwithstanding the confidentiality requirements of Judiciary Law § 45(1), she felt she had a right to tell anybody who

would listen. Finally, the testimony of Mr. Brown makes it clear that Ms. Koch's purpose in filing the complaint was to go after Respondent because of his position on vaccines, which was clearly an improper purpose.

It is apparent from these facts that the defamation action was directed solely against Ms. Koch's improper conduct and was not an attack on the Commission.

**D. Ms. Koch Waived Whatever Privilege She May
Have had by Disclosing the Contents of the
Complaint to Numerous Individuals Before
The Defamation Action was Commenced.**

In his main brief, Respondent explained that well-established case law holds that privileges are waived by disclosure and, further, that Ms. Koch waived whatever privilege she may have had by publishing the fact that she filed the complaint and the contents thereof to numerous individuals long before the defamation action was commenced, including the Mayor of the City of Poughkeepsie, which she admitted made the complaint public (Tr. 190-191, 284-287), Mr. Brown (R 285, 311-315, 319, 337), Ms. Feather, (Tr. pp. 41-44, 285), Ms. Monteverdi (Tr. pp. 80-81), her boss (Dr. Modi), her husband, her brother and others (Tr. p. 286). Such disclosure was not inadvertent but was intentional because Ms. Koch admitted she "would probably tell anyone who would listen" (Tr. pp. 286-287).

The Referee refused to consider this argument, claiming that the issues of whether Ms. Koch had an absolute privilege or waived the privilege would necessarily involve relitigation of the dismissal of the defamation action which is barred by the doctrine of collateral estoppel (Report at p. 32). Respondent explained in his main brief why the Referee's conclusion is incorrect.

Commission Counsel argues in its brief that complaints filed with the Commission are absolutely privileged but ignores the case law holding that privileges can be waived and, more importantly, ignores the fact that the privilege was, in fact, waived by Ms. Koch by her repeated

public disclosures of the complaint and the contents thereof. Importantly, as explained in detail in Respondent's main brief, Justice Rosa's decision was expressly based on the fact that she was led to believe that Ms. Koch had not made any public disclosures and, thus, had not waived any privilege.

It is apparent from the undisputed proof that whatever privilege Ms. Koch may have had by reason of her filing of her complaint with the Commission was waived when she intentionally and knowingly disclosed the complaint and the contents thereof to numerous individuals well before Respondent commenced the defamation action. Further, it is clear that Ms. Koch violated the confidentiality provisions of Judiciary Law § 45(1) by making the above-described disclosures.

**E. The Commencement of the Defamation Action
Did Not Have a Chilling Effect Because Ms. Koch Had
Already Made the Contents of the Complaint Public.**

The Commission argues that, by commencing the defamation action Respondent disclosed the complaint to the public and that this would have a chilling action on people who filed complaints with the Commission. This is the same position adopted by the Referee, and it is based solely on the fiction created by Commission Counsel that it was Respondent who publicly disclosed the complaint. Commission Counsel and the Referee conveniently ignore the undisputed proof discussed in detail in Respondent's brief that it was Ms. Koch who publicly disclosed the complaint and the contents thereof long before the defamation action was commenced.

As explained in Respondent's main brief, almost immediately after filing the complaint, Mr. Koch wrote to the Mayor of the City of Poughkeepsie regarding the complaint and then proceeded to tell numerous people including Mr. Brown, Ms. Feather, (Tr. pp. 41-44, 285), Ms. Monteverdi (Tr. pp. 80-81), her boss (Dr. Modi), her husband and her brother (Tr. p. 286) about the complaint. All of this occurred well before Respondent commenced the defamation action.

Thus, it was Ms. Koch, not Respondent, who violated Judiciary Law § 45(1) and made the complaint public.

As stressed by Commission Counsel to Justice Rosa in the defamation action, to the Referee at the hearing, and in its brief, proceedings before the Commission are confidential (Judiciary Law § 45[1]). As observed by Justice Rosa in her decision dismissing the defamation complaint (Comm. Ex. 15 at pp. 6-7), that confidentiality protects both the complainant and the judge regarding whom the complaint is made. Similarly, in *Wiener v Weintraub* (22 NY2d 330 [1968]), the case relied on by the Commission for its position that Ms. Koch is entitled to an absolute privilege, the court observed that the confidentiality requirement for complaints against attorneys protects the attorney with respect to unwarranted complaints (*Id.* at 332).

Here, not only did Ms. Koch waive the privilege when she disclosed the complaint to third parties, she also violated the confidentiality that Respondent was entitled to rely on.

Importantly, as explained by Respondent in his main brief, Respondent learned for the first time during the hearing before the Referee that Commission Counsel was aware prior to the hearing that Ms. Koch had publicly disclosed the complaint and the contents thereof almost immediately after she had filed it and had, by this conduct, destroyed the confidentiality of the proceedings (Tr. pp. 294-296). Notwithstanding the knowledge that Ms. Koch had not only waived any privilege but also had violated the confidentiality provisions of Judiciary Law § 45(1), Commission Counsel not only failed to advise the Referee or Respondent of that fact but affirmatively proceeded at the hearing as if they were unaware of that fact. The Commission's attorney stated in her opening statement that "it was Judge Mora who made Koch's private statements about him public when he publicly filed his defamation lawsuit and attached a copy of Ms. Koch's complaint to the lawsuit" (Tr. p. 14). This was disingenuous and untrue because

Commission Counsel was aware that it was Ms. Koch who had publicly disclosed the complaint long before the defamation action was commenced. Further, Commission Counsel questioned Respondent during the hearing suggesting that he violated the confidentiality of the Commission's proceedings by filing the complaint (Tr. pp. 553-555) when she was well aware that it was Ms. Koch who had violated the confidentiality of these proceedings long before Respondent commenced the defamation lawsuit. The Referee made no conclusions with respect to this issue other than his finding that Ms. Koch disclosed her complaint to others (Report at p. 9).

Even knowing the above facts, Commission Counsel continues to not only ignore this issue but to continue its obfuscation. Throughout its brief, Commission Counsel continues to falsely argue that it was Respondent who publicly disclosed the complaint by filing the defamation lawsuit when Commission Counsel has been aware since prior to the hearing before the Referee that it was Ms. Koch who publicly disclosed her complaint to the Commission within a day or two after she filed it.

Commission Counsel argues that the defamation lawsuit was an attack on its integrity and that Respondent should have allowed the investigation process of the Commission to play out. This argument is ironic in light of the undisputed fact that Commission Counsel has been aware since prior to the hearing that Ms. Koch violated Judiciary Law § 45(1) by publicly disclosing the complaint within a day or two after she filed it. While it may generally be true that a judge suing a person who filed a complaint with the Commission could dissuade a person from filing a meritorious complaint, Respondent's commencement of the defamation action in the instant case could not create such a chilling effect. In a typical case, a person files a complaint with the Commission and an investigation takes place. During that time, the confidentiality requirements of Judiciary Law § 45(1) protect the complainant, the judge and the process as a whole (*see Weiner*

v Weintraub, 22 NY2d at 332). Here, however, Ms. Koch not only filed a complaint, but she stated to Mr. Brown that her purpose in doing so was to go after Respondent because of his position on vaccines (Tr. pp. 311-313, 410), clearly not a proper purpose. More importantly, instead of complying with the confidentiality provisions of Judiciary Law § 45(1), Mr. Koch immediately wrote to the Mayor of the City of Poughkeepsie regarding the complaint, which she admitted made the complaint public (Tr. 190-191, 284-287) and then proceeded to tell numerous people including Mr. Brown, Ms. Feather, (Tr. pp. 41-44, 285), Ms. Monteverdi (Tr. pp. 80-81), her boss (Dr. Modi), her husband, her brother and others (Tr. p. 286) about the complaint. Further, Ms. Koch admitted that such disclosure was not inadvertent but was intentional (Tr. p. 286-287).

Even more troubling is the Commission Counsel's apparent acquiescence of Ms. Koch's improper conduct. Ms. Koch admitted that she advised Commission staff, including its attorney, prior to the hearing that she had disclosed her complaint to the Mayor of Poughkeepsie (Tr. pp. 294-296), which disclosure was a violation of Judiciary Law § 45(1). Despite being aware of this fact, Commission Counsel not only failed to advise Respondent or the Referee of Ms. Koch's conduct but affirmatively misstated during the hearing that it was Respondent who violated the confidentiality provision by commencing the defamation action and making Ms. Koch's statements public and ignoring the fact that Ms. Koch had destroyed the confidentiality of these proceedings long before Respondent commenced the lawsuit. Commission Counsel fails to address its conduct in its brief but, instead, continues its false narrative that it was Respondent who made the complaint public.

If there was any chilling effect from what occurred in this case, it would be on judges who may be the subject of complaints to the Commission in the future. Those judges cannot safely rely on the confidentiality requirements of Judiciary Law § 45(1) because they will legitimately fear

that Commission Counsel will turn a blind eye to violations of such statutorily mandated confidentiality requirements.

CONCLUSION

The Referee's recommendation that there is no basis for Charges I and III should be confirmed. The Referee's recommendation to sustain Charge II should be disaffirmed because (1) Respondent relied in good faith on the advice of counsel in commencing the defamation action, (2) Ms. Koch waived whatever privilege she may have had by disclosing both the filing of the complaint and the contents thereof to numerous third parties long before the defamation action was commenced, (3) the filing of the defamation action did not breach any confidentiality because Ms. Koch had already breached the confidentiality of the proceedings before the Commission and (4) Respondent did not commence the defamation action in retaliation for Ms. Koch's filing of the complaint with the Commission.

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O'CONNELL AND ARONOWITZ, P.C.

By: 
Stephen R. Coffey
Attorneys for Respondent Hon. Frank M. Mora
6 Airport Park Boulevard
Latham, New York 12110
(518) 462-5601